

NOT FOR PUBLICATION

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

UNITED STATES OF AMERICA,)	
)	
Plaintiff)	
)	
v.)	
)	CRIM. NO. 2004-05F/R
CRAIG M. HENDRICKS,)	
RUSSELL ROBINSON, aka "Don,")	
ELROY DOWE,)	
DANIEL FLEMING,)	
RANNEY LARONDE, aka "Ronnie,")	
ANDY ANTOINE,)	
RUDOLPH CLARKE,)	
RAFAEL CINTRON,)	
JACQUELYN CARR,)	
)	
Defendants)	
_____)	

ATTORNEYS:

Eric Chancellor, Esq.
Law Offices of Eric Chancellor
2111 Company Street, Ste. 7
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Attorney for Defendant Elroy Dowe

Patricia M. Sulzbach, AUSA
Federal Building & U.S. Courthouse
5500 Veterans Drive, Ste. 260
St. Thomas, VI 00802
Attorney for the Government

MEMORANDUM OPINION

Finch, Chief Judge

This matter comes before the Court on Defendant Elroy Dowe's Motion to Suppress Wiretap Evidence for Violation of Title III (Evidentiary Hearing Requested) and Defendant Elroy Dowe's Supplemental Motion to Suppress Wiretap Evidence for Violation of Title III (Evidentiary Hearing Requested). A hearing was held on these motions on January 15, 2004. For the reasons expressed herein, Defendant's motions will be denied.

I. Background

On January 6, 2003, a wiretap intercept on a telephone believed to be used by Elroy Dowe was issued. Defendant Dowe has brought forth these motions arguing that evidence seized from the wiretap intercept of a cellular telephone with the numbers 340-473-6907 and 340-473-8087 should be suppressed on the basis that the recordings violate 18 U.S.C. § 2518. For a judge to authorize the interception of wire communications, the law requires that the facts submitted demonstrate probable cause that an individual is committing, has committed, or is about to commit a violation of 18 U.S.C. § 2516; probable cause that interception will yield specific communications related to that offense; that alternative procedures have either failed or reasonably appear likely to fail or are too dangerous; and probable cause that the wire communications intercepted are leased to, listed under the name of or, or commonly used by the person. 18 U.S.C. § 2518(3).

Defendant Dowe believes that the January 6, 2003 wiretap intercept was not supported by the requisite probable cause nor necessity. He further advocates that Title III is designed to prevent invasions of privacy and that the evidence seized from the wiretap intercepts include calls between Defendant Dowe and his girlfriend which would cause embarrassment to

Defendant Dowe since he is married to another woman. The Government contends that both the October 2002 and the January 6, 2003 wiretaps were lawful and fulfilled the requirements of probable cause and necessity.

II. Analysis

A. Probable Cause Requirement

In U.S. v. Vento, 533 F.2d 838, 847 (3d Cir. 1976), the Third Circuit declared that for a wiretap application in which informants have provided the main basis for probable cause, the appropriate test for probable cause is governed by the analysis regarding probable cause for search warrants found in Aguilar v. Texas, 378 U.S. 108, 114, 84 S.Ct. 1509, 1513, 12 L.Ed.2d 723, 728 (1964) and Spinelli v. United States, 393 U.S. 410, 415-416, 89 S.Ct. 584, 588, 21 L.Ed.2d 637, 643 (1969). Id. at 847 (citing United States v. Armocida, 515 F.2d 29, 36 (3d Cir. 1975); United States v. Falcone, 505 F.2d 478, 481 (3d Cir. 1974); United States v. McNally, 473 F.2d 934 (3d Cir. 1973)). However, the Aguilar-Spinelli test has since been replaced by a “totality of the circumstances” approach under Illinois v. Gates, 462 U.S. 233, 103 S. Ct. 2317, 76 L.Ed.2d 527 (1983). Under the Gates approach, an informant’s “reliability” and “basis of knowledge” are still important considerations in determining whether probable cause is sufficient, but other circumstances must be taken into account as well. Id. at 233. Additionally, the Third Circuit has held that “after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review.” Id. at 236.

Regarding the wiretap intercept issued on January 6, 2003 for a telephone believed to be used by Elroy Dowe, Defendant Dowe questions Special Agent Tokarz’s corroboration of

Confidential Source #1 (“CS#1”). Defendant claims that Agent Tokarz’s corroboration was based on CS#1 providing recorded conversations between Craig Hendricks and Elroy Dowe which evidenced a deal for one kilogram of cocaine. Defendant Dowe claims that neither he nor Defendant Hendricks consented to the October 2002 telephone conversation being recorded and that therefore the October 2002 recording was not lawful. Defendant Dowe argues that if this Court finds the October 2002 wiretap intercept to be illegal, then it should suppress evidence resulting from the January 6, 2003 wiretap since it would be derived from an illegal wiretap intercept.

The Government contends that the application and affidavit supporting each wiretap request establishes the requisite probable cause. Applying the totality of the circumstances approach, the Court agrees. Defendant’s argument is irrelevant because even if Special Agent Tokarz’s corroboration of CS#1 did not constitute sufficient probable cause, it was not the sole basis upon which probable cause was established in Special Agent Tokarz’s affidavit. There was a sufficient basis, independent of any information obtained from CS#1, upon which probable cause could be found to support the issuance of a wiretap. In the affidavit accompanying the wiretap application, Special Agent Tokarz stated that toll analysis and pen registers indicated that Elroy Dowe’s cellular telephone was in frequent contact with four other individuals alleged to be involved in the conspiracy. (Affidavit of Special Agent Joseph A. Tokarz, 8 - 9, 35 - 38). Furthermore, CS5 identified Elroy Dowe as a subordinate to Hendricks’ illegal activities whose duties included “facilitating communications between Hendricks and his criminal associates.” (Affidavit of Special Agent Joseph A. Tokarz, 18). Special Agent Tokarz vouched for CS5’s reliability in explaining that CS5 has provided information that has been verified and

corroborated by independent sources, CS5 provided information that criminally implicated CS5 and CS5's close friends or relatives, and that CS5 previously made a controlled purchase from Craig Hendricks. (Affidavit of Special Agent Joseph A. Tokarz, 17).

B. Necessity Requirement

Regarding the necessity requirement for obtaining authorization for a wiretap, the Third Circuit in U.S. v. Vento, 533 F.2d 838 (3d. Cir. 1976), held that “[i]t is sufficient that the government show that other techniques are impractical under the circumstances and that it would be unreasonable to require pursuit of those avenues of investigation. The government must, however, fully explain to the authorizing judge the basis for such a conclusion.” *Id.* at 849 (citing United States v. Curreri, 388 F.Supp. 607, 620-21 (D.Md.1974)). The Third Circuit emphasized the disjunctive language of 18 U.S.C. § 2516(3)(c) and noted that the Government need not prove that alternative methods have failed. In the instant case, Defendant Dowe argues that the Government had five confidential informants who were allegedly dealing with Hendricks, but the Third Circuit in Vento noted that “[u]ndercover agents are not readily insinuated into a conspiracy, and may be exposed to unusual danger.” U.S. v. Vento, 533 F.2d at 850. The Third Circuit pointed out that the full extent of a criminal conspiracy may not be discoverable through the use of undercover agents. Therefore, having imbedded informants in a case would not automatically render wiretapping unnecessary

Again, the Government argues that the application and affidavit for each wiretap request supports its position that the necessity requirement was fulfilled. The Court agrees. The Government was investigating a complex criminal conspiracy. Furthermore, according to Special Agent Tokarz’s affidavit accompanying the wiretap application, at that time the

Government only had one informant who was in contact with Craig Hendricks and this informant was not privy to information central to the conspiracy. (Affidavit of Special Agent Joseph A. Tokarz, 39).

III. Conclusion

For the foregoing reasons, Defendant Dowe's Motion to Suppress Wiretap Evidence for Violation of Title III (Evidentiary Hearing Requested) and Defendant Dowe's Supplemental Motion to Suppress Wiretap Evidence for Violation of Title III will be denied. An appropriate Order is attached.

ENTER:

Dated: March 4, 2004

RAYMOND L. FINCH
CHIEF U.S. DISTRICT JUDGE

Attest:
Wilfredo F. Morales
Clerk of the Court

By: _____
Deputy Clerk

cc: Hon. Jeffrey L. Resnick
Patricia M. Sulzbach, Esq.
Eric Chancellor, Esq.
Andrew Capdeville, Esq.
Stephen Brusch, Esq.
Leonard B. Francis, Esq.

Anna Paiewonsky, Esq.
Kevin Weatherbee, Esq.
Clive Rivers, Esq.
Treston E. Moore, Esq.
Jomo Meade, Esq.

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Defendants)	
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ORDER

THIS MATTER is before the Court on Defendant Elroy Dowe's Motion to Suppress Wiretap Evidence for Violation of Title III (Evidentiary Hearing Requested), docket items # 146 and 194, and Defendant Elroy Dowe's Supplemental Motion to Suppress Wiretap Evidence for Violation of Title III (Evidentiary Hearing Requested), docket item # 197. A hearing was held on these motions on January 15, 2004.

In accordance with the reasons set forth in the attached Memorandum Opinion, the Court finds that the January 6, 2003 wiretap request (filed in St. Thomas Misc. No. 2003-01) fulfilled the requirements of probable cause and necessity. Accordingly, it is hereby

ORDERED that Defendant Dowe's motions are **DENIED**.

ENTER:

Dated: March 4, 2004

RAYMOND L. FINCH
CHIEF U.S. DISTRICT JUDGE

Attest:

Wilfredo F. Morales
Clerk of the Court

By: _____
Deputy Clerk

cc: Hon. Jeffrey L. Resnick
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